

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Grain Belt Express)
Clean Line LLC for a Certificate of Convenience and)
Necessity Authorizing It to Construct, Own, Operate,)
Control, Manage, and Maintain a High Voltage, Direct) File No. EA-2014-0207
Current Transmission Line and an Associated)
converter Station Providing an Interconnection on the)
Maywood-Montgomery 245 kV Transmission Line.)

**RESPONSE OF INFINITY WIND POWER TO MOTION TO STRIKE CERTAIN
PREFILED EVIDENCE OF MISSOURI LANDOWNERS ALLIANCE**

Infinity Wind Power (Infinity) hereby responds to the *Motion of Missouri Landowner Alliance to Strike Certain Pre-Filed Evidence on the Basis of Section 536.070(11) RSMo.* (Motion), filed in the above-captioned matter on November 4, 2014.

I. BACKGROUND

1. On November 4, 2014, the Missouri Landowners Alliance (Alliance) filed its Motion requesting the Missouri Public Service Commission (Commission) strike certain prefiled testimony and schedules on the grounds that the evidence is inadmissible under the terms of § 536.070(11) RSMo.

2. On November 5, 2014, the Commission issued its *Order Directing Filing*, ordering interested parties to file responses to the Motion no later than November 6, 2014.

3. On November 6, 2014, Grain Belt Express Clean Line LLC (Grain Belt Express) filed its opposition to the Motion. Infinity has reviewed Grain Belt Express' filing and supports the conclusions contained therein, and incorporates herein by reference the arguments, case law and statutes cited. However, because the Alliance's Motion is directed, in part, at Infinity witness, Mr. Matt Langley,¹ Infinity hereby submits this additional response.

¹ Motion, pp. 8-9.

II. RESPONSE

4. In its Motion, the Alliance argues that Section 536.070(11) of the Missouri Administrative Procedure Act prohibits admission of certain data and studies unless a witness who can testify as to the accuracy of the results is present at hearing, and that the prohibition is applicable to Commission proceedings.² The Alliance cites to *Big River Telephone Company v. Southwestern Bell Telephone Company*, WD76420, slip opinion at 13 (MO App June 3, 2014) as support for its position.³

5. The Alliance uses the referenced statute and case to argue that Exhibit ML-1 attached to the cross-surrebuttal testimony of Infinity witness Mr. Langley, and the corresponding discussion of the exhibit contained within the testimony, should be stricken because Mr. Langley is not the author of the exhibit. However, the Alliance's novel position disregards the fact that "in all investigations, inquiries or hearings, the commission or commissioner shall not be bound by the technical rules of evidence."⁴ An application of the Alliance's interpretation of Section 536.070(11) would make the majority of testimony submitted to and on behalf of the Commission inadmissible. It is illogical to assume that the legislature would task the Commission with the oversight of public utilities and then render the Commission ineffective by disallowing expert testimony, as proposed by the Alliance.

6. It is understood that the testimony of experts "is based upon facts that the expert did not personally observe..."⁵ Additionally, Section 490.065.3 RSMo. sets forth the standards under which expert testimony is to be admissible and provides that, "[t]he facts or data in a

² Motion, p. 1, ¶1.

³ Id.

⁴ Section 386.410.2 RSMo.

⁵ *Eagan v. Duello*, 173 S.W.3d 341, 351 (Mo.App. W.D.2005).

particular case upon which an expert bases an opinion or inference...must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.”

7. The courts have recognized Section 490.065.3 and have stated that “under Missouri law, the evidence experts rely on in forming their opinions ‘need not be independently admissible,’ so long as it is the type of evidence reasonably relied on by experts in the field and is otherwise reasonably reliable.”⁶

8. In the instant case, Exhibit ML-1 is a publically available document that was attached to the sworn testimony of Southwestern Public Service Company (SPS) witness Bennie Weeks in a matter before the New Mexico Public Regulatory Commission (NMPRC).⁷ In that proceeding, SPS sought and obtained commission approval of certain purchased power agreements (PPAs) for wind energy. As explained by Mr. Langley in his discussion of the document, Exhibit ML-1 summarizes the bids SPS received as part of its solicitation for PPAs.⁸ Mr. Langley used the exhibit to calculate capacity factors of wind projects that have recently been successfully bid in the industry.

9. Because the exhibit was attached as support for PPAs entered into by a major utility and was ultimately accepted by the NMPRC, the exhibit clearly meets the requirements of being information “reasonably relied on by experts in the field” and is “otherwise reasonably reliable.”

10. First, experts in the wind generation field would “reasonably rely” upon data such as that contained in Exhibit ML-1 because the data was submitted by a major utility, and utilities

⁶ *Peterson v. National Carriers, Inc.*, 972 S.W.2d 349, 355 (Mo.App. W.D.1998).

⁷ Cross-Surrebuttal Testimony of Matt Langley, pp. 2-3.

⁸ *Id.*

are significant purchasers of wind energy, making the data of utmost interest to wind generators. Monitoring commission proceedings relating to wind energy PPAs is certainly an acceptable means for wind industry experts to keep apprised of the regulatory and competitive cost environment of their given field. Mr. Langley is the Director of Business Development and responsible for acquiring PPAs for Infinity and is tasked with staying apprised of current market conditions, and monitoring commission proceedings is one way to do so. As the Commission well knows, employees and consultants of public utilities regularly track the filings of other public utilities for the purpose of staying apprised as to current trends in any given area, and it stands to reason that wind generation experts do the same.

11. Second, it can be reasonably assumed that the data contained in the exhibit was closely scrutinized and fully vetted as part of the NMPRC's investigation into the SPS application and is, therefore, "otherwise reasonably reliable." Arguably, the NMPRC is similarly tasked as this Commission in ensuring rates are just and reasonable, and as such must rigorously analyze data provided in support of rate impacting issues such as PPAs. The data was submitted under sworn oath by Ms. Weeks and had the NMPRC found the document and/or underlying data lacking it presumably would not have approved the application filed by SPS.

12. Because Exhibit ML-1, provided and discussed by Mr. Langley, is the type of data "reasonably relied on by experts in the field" and is "otherwise reasonably reliable," the Commission should reject the Alliance's arguments and deny the Motion.

13. As to the *Big River* case cited by the Alliance, that court cited to *State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n of State of Mo.*, 976 S.W.2d 485, 495 (Mo.App.W.D.1998) and stated that, "so long as the witness 'had sufficient knowledge and experience so that his testimony would be of assistance to the PSC in reaching its determination,'

the testimony will be deemed properly admitted.” The Court also held that the qualifications of the sponsoring witness goes to the weight of the evidence and not its admissibility.⁹

14. Mr. Langley offered the exhibit and corresponding testimony to this Commission as a illustrative example of the current market conditions, and the capacity factor and corresponding cost per MWh associated with successfully bid wind projects in today’s competitive environment. As an active and qualified participant in the wind industry, Mr. Langley has sufficient knowledge and experience to support his pre-filed testimony as written, and that testimony can be of assistance to this Commission in understanding the wind industry and its current competitive status. Based on the foregoing discussion, the Commission should allow the admission of Mr. Langley’s cross-surrebuttal testimony and exhibit in their entirety.

WHEREFORE, for the reasons stated above, Infinity Wind Power respectfully requests that the Commission deny in its entirety the *Motion of Missouri Landowner Alliance to Strike Certain Pre-Filed Evidence on the Basis of Section 536.070(11) RSMo.*

Respectfully submitted,

/s/ Terri Pemberton

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ATTORNEYS FOR INFINITY WIND POWER

⁹ *Big River* at 511.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon the parties to this proceeding by email or U.S. Mail, postage prepaid, this 6th day of November 2014.

/s/ Terri Pemberton

Terri Pemberton

Attorney for Infinity Wind Power